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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

~~No. 967~~ 70-5033

EARL A. LOVE, UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

vs.

THE PULLMAN COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS AMICUS CURIAE

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OPINIONS BELOW

The opinion on rehearing (A. 67-71) and the original opinion of the Court of Appeals (A. 56-66) are reported at 430 F.2d 49. The order of the district court (A. 12-14) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals on rehearing was entered on July 30, 1970 (A. 73). On October 1, 1970, Mr. Justice White extended the time for filing a petition for writ of certiorari to November 12, 1971. The petition was filed on November 10, 1970, and was granted on February 22, 1971. The jurisdiction of the Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Were Petitioner's good faith efforts to comply with the procedural requirements of Title VII (as interpreted for him by the Equal Employment Opportunity Commission) sufficient to afford the district court jurisdiction to hear his claim of racial discrimination on its merits?

II. Assuming Petitioner's efforts were in some respect defective, should he be penalized for any such irregularity when it occurred because of the actions of the Equal Employment Opportunity Commission?

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The pertinent provisions of Title VII of the Civil Rights Act of 1964 and the pertinent regulations of the Equal Employment Opportunity Commission are set forth as Appendix A to the Brief of the United States and the Equal Employment Opportunity Commission.

INTEREST OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

The National Association for the Advancement of Colored People has historically sought redress through the courts and the administrative agencies for acts of discrimination based upon race. In the critical area of em-

ployment discrimination the major vehicle at the federal level for obtaining relief is Title VII of the Civil Rights Act of 1964, which is administered by the Equal Employment Opportunity Commission. The NAACP is vitally concerned with the effective administration of Title VII by the EEOC. The NAACP is also vitally concerned with the problem of the private litigant who bears the primary responsibility for obtaining judicial enforcement of the Act. The decision of the Court of Appeals for the Tenth Circuit has the effect of destroying the simple, effective machinery which the EEOC has developed to administer critical provisions of Title VII. It has placed in jeopardy the jurisdiction of the EEOC and the federal courts over thousands of potentially meritorious charges of employment discrimination. It creates serious and unnecessary procedural hazards for the lay citizen seeking to exercise his federal right to judicial or administrative relief from discrimination. Therefore, the decision of the court below is inimical to the public as a whole, to the interests of persons whom the NAACP represents, and to the programs for eliminating employment discrimination carried out by the NAACP.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

The National Association for the Advancement of Colored People respectfully moves this Court for leave to file the attached brief amicus curiae in the above-styled case for the reasons set forth below:

PROCEEDINGS BELOW

Petitioner Earl Love, a black man, was employed as a porter by Respondent Pullman Company for more than forty years. From 1951 until his retirement in November 1968, Mr. Love was classified as a "porter in charge".

This is the ninth year since Petitioner began formally challenging, as racially discriminatory, the fact that his job classification has historically been reserved for blacks, while white persons, performing the identical duties, are called "conductors". Persons performing duties in the white classification of conductor receive a substantially higher wage than those working in the black classification of porter.

Petitioner Love began his quest for relief from racial discrimination well before the enactment of Title VII of the Civil Rights Act of 1964 by filing, in 1963, a charge of discrimination with the Colorado Civil Rights Commission. The Colorado Commission apparently took no action on this complaint. In 1965, Petitioner orally renewed his allegations of race discrimination which the state commission treated as a reopening of the 1963 case.

The 1965 state proceedings were terminated in July of that year when Petitioner turned down, as unacceptable, an offer by the Pullman Company to promote him to the conductor classification but only at the price of forfeiting the forty years' seniority protection against layoffs which he accumulated in the (black) porter's classification. To accept this offer would have cost him his job since without seniority he would have been laid off.[1]

Still being subjected to the discriminatory classification and pay practices, Petitioner next sought to enlist the aid of the Equal Employment Opportunity Commission

1. It should be noted that such an offer falls far below the remedy of elimination of present effects of past discrimination, mandated by Title VII. *U. S.* v. *Bethlehem Steel,* F.2d , 3 FEP Cases 589 (C.A. 2 1971); *Griggs* v. *Duke Power Co.,* 420 F.2d 1255 (4th Cir. 1970), rev'd on other grounds 401 U.S. 424 (1971); *Local 189 United Papermakers and Paperworkers* v. *U. S.,* 416 F.2d 980 (C.A. 5 1969), cert. denied 347 U.S. 919 (1970).

(EEOC). On May 19, 1966, Mr. Love wrote the EEOC to complain of the same discrimination which the state had failed to remedy. The communication was received by the EEOC on May 23, 1966.

Like many other Title VII claimants, Petitioner had submitted his charge of discrimination to the EEOC without first sending it to a state agency with jurisdiction over the complaint. Since Petitioner was making an essentially new charge of discrimination based upon the continuing discrimination by Respondent, under Section 706(b) the Colorado Commission was to be given an opportunity to act prior to the commencement of the federal investigation.

At the time Petitioner's charge was submitted, the EEOC had promulgated procedural regulations which applied to such charges (30 Fed. Reg. 8408):

> "In any instance in which an aggrieved person seeks to file a charge and it appears from the charge or other information that the aggrieved person has not begun proceedings before a state or local authority pursuant to Section 706(b) of Title VII, the Commission may not accept the charge for filing *but shall assist the aggrieved person in complying with Section 706(b).*" (Emphasis added).

In accordance with this procedure, the EEOC contacted the Colorado Commission to advise it of Petitioner's letter of May 19, 1966. The response of the Colorado Commission was contained in a letter of June 1, 1966, in which the Director of that agency stated that, in light of its previous contacts with Mr. Love and its unsuccessful attempts to resolve that discrimination, the State Commission "could not in good conscience accept the sixty day deferral period and accordingly waive[s] it."

The EEOC then "filed" Petitioner's charge on June 1, 1966, the date the state waived jurisdiction. On July 23, 1966, Petitioner transferred his earlier letter charge to a standard EEOC charge form.

The EEOC processed his charge of discrimination for nearly two years. During that time, Rospondent did not dispute the EEOC's jurisdiction to process the charge, either at the time the charge resulted in a finding of reasonable cause to believe that Title VII had been violated, or in the subsequent, unsuccessful conciliation efforts. Upon the failure of conciliation efforts, the EEOC on May 3, 1968, advised Petitioner that he had thirty days within which to commence a civil action to compel compliance with Title VII. This suit was commenced within that time period.

On Respondent's motion the District Court dismissed the action on the ground that the EEOC, under Section 706(b) of Title VII, had never acquired jurisdiction over Petitioner's charge. The assigned reason was that these federal proceedings had not been commenced within 30 days of what the court ruled was the termination of Petitioner's state proceeding in July of 1965. The District Court did not discuss the events of May and June 1966 wherein the EEOC advised the State of the charge, the State explicitly waived jurisdiction, and EEOC thereupon assumed jurisdiction over the charge of discrimination.

By a two-to-one vote, the Court of Appeals affirmed on two grounds. First, the majority upheld the district court's ruling that the failure to file a complaint with the EEOC within 30 days of the Colorado Commission's 1965 reopening barred the action under Title VII. Second, the majority ruled that even if the failure to file in 1965 was not a bar, the EEOC was without authority to treat Mr.

Love's charge as "filed" on May 23, 1966, and therefore lacked authority "without further correspondence from (Petitioner)" subsequently to treat it as filed on June 1, 1966, the date on which the State of Colorado waived jurisdiction. The Court specifically invalidated the procedure followed by EEOC in Petitioner's case, and which had by that time become the standard agency practice in the processing of many thousands of similar charges. In his dissent, Judge Fahy stated that after the Colorado Commission waived jurisdiction EEOC was "entitled" to "assume jurisdiction," and that the majority's ruling "unduly restricts the right of EEOC to entertain and expedite claims for which it has a responsibility under the Act to seek a solution."

Primarily because of the potential invalidation of similar charges of discrimination, both the Department of Justice and the EEOC (which had appeared as *amicus* before the original panel) sought and were granted the right to intervene. Petitioner and the intervenors moved for rehearing or, in the alternative, rehearing *en banc*. The case was reargued before the original panel which upheld its earlier result by a two-to-one vote, with each member of the panel filing his own opinion. Judge Seth, who had written the earlier majority opinion, acknowledged that the primary ground of his earlier decision—that the failure to file within 30 days of the termination of the 1965 proceedings of the Colorado Commission barred further action by EEOC—was erroneous, since the 1965 complaint involved conduct occurring prior to the effective date of Title VII, and now rested on the second leg of the earlier decision—that EEOC did not, as a matter of law, gain jurisdiction over the charge in the absence of a specific affirmation by Petitioner that he continued to desire federal relief.

Chief Judge Lewis concurred in a one paragraph opinion because he did not wish to give "judicial approval to administrative 'flexible' filing to obtain, postpone, or reject jurisdiction." Judge Fahy dissented again, agreeing with the Court that the 1965 complaint involved conduct prior to the effective date of Title VII, but otherwise adhering to his earlier views.

Discussion

Carving through the confusion of Sections 706(b) and (d) and the five opinions of three circuit court judges seeking to interpret these sections, it finally becomes apparent that this case presents a simple, straightforward issue: Did petitioner lose his right to seek relief from racial discrimination under Title VII because he failed to write a letter reaffirming an earlier written request that EEOC investigate his case?

Courts faced with analogous questions involving alleged technical defects in complying with other procedural provisions of Section 706 have almost universally answered "No" because they have refused to elevate form over substance and thereby defeat the humanitarian, remedial purposes of the Act. *Sanchez* v. *Standard Brands*, 431 F.2d 455 (C.A. 5 1970); *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888 (C.A. 5 1970). The approach of the majority below, on the other hand, rests in a profoundly disturbing view of the purpose and intent of Title VII, for it is clear that a majority of that court believes that the statute is to be rigidly interpreted and that the most inconsequential procedural considerations outweigh serious substantive issues,—that Congress intended in Section 706(b) and (d) to create a succession of procedural pitfalls to trap the litigant and deny him the substantive rights the law putatively offers.

ARGUMENT

I.

Petitioner Adequately Complied with the Requirements of Section 706.

A. The Purpose of Section 706.

The normal starting point for the analysis of any statute is, of course, its language. Section 706(b) provides as follows:

> "In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority."

Section 706(d) provides as follows:

> "A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an

> unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

As the court noted in *Vigil* v. *American Telephone and Telegraph Co.*, 305 F.Supp. 44 (D. Colo. 1969), a technical reading of these provisions would require that "to meet the Act's requirements a plaintiff would have a Philadelphia solicitor in constant attendance and he might miss a turn even with this assistance." Thus, the wooden approach taken by the court below is hardly appropriate in interpreting these sections.

This is especially true because of the fact that the statutory scheme set up by Congress relies on the lay private citizen for enforcement of the national policy against racial discrimination. Thus, courts interpreting Section 706 have recognized that its procedural provisions —designed to give the federal, state and local governments an opportunity to remedy discrimination by administrative means—are secondary to the overriding purpose of creating a private right-of-action to enforce the law. *Dent* v. *St. Louis-San Francisco Ry. Co.*, 406 F.2d 399 (C.A. 5 1969); *Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357 (C.A. 7 1968). Adhering to the principle that lay persons upon whom the Act depends for enforcement should not be subjected to a system of procedural forfeitures, courts have held the following statutory provisions do not generate jurisdictional requirements:

(1) *Failure to file a charge with EEOC* as provided by Section 706(d). *DeFigueriredo* v. *TWA*, 322 F. Supp. 1384 (S.D. N.Y. 1971) (where EEOC had already processed the identical charge of another person, filing by plaintiff would be a "futile ceremony" and was not required.)

(2) *Swearing of charges* as provided in 706(a). *Weeks* v. *Southern Bell Tel. & Tel. Company*, 408 F.2d 228 (C.A. 5 1969); *Blue Bell Boots* v. *EEOC*, 418 F.2d 355 (C.A. 6 1969); *Choate* v. *Caterpillar Tractor, supra.*

(3) *Service of the charge* as provided in Section 706(a). *Mondy* v. *Crown Zellerbach*, 271 F.Supp. 258 (E.D. La. 1967), *reversed on other grounds sub nom. Oatis* v. *Crown Zellerbach*, 398 F.2d 496 (C.A. 5 1968); *IBEW, Local 5* v. *EEOC*, 398 F.2d 248 (C.A. 3, 1968), *cert. denied*, 393 U.S. 1021 (1969).

(4) *Filing suit prior to completion of the administrative process* as provided by 706(a), (e). *Johnson* v. *Seaboard Airlines RR.*, 405 F.2d 399 (C.A. 5 1969).

(5) *Failing to file suit within a specified number of days following the filing of the administrative charge* as provided by 706(a), (e). *Cunningham* v. *Litton Industries*, 413 F.2d 887 (C.A. 9 1969); *Miller* v. *International Paper*, 408 F.2d 283 (C.A. 5 1969).

(6) *Failing to file suit within 30 days of the receipt of statutory notice of the right to sue* as provided by 706(e). *McQueen* v. *EMC Plastic Co.*, 302 F.Supp. 881 (E.D. Tex. 1969); cf. *Antonopulos* v. *Aerojet-General Corp.*, 295 F.Supp. 1390 (E.D. Calif. 1968).

(7) *Filing with the EEOC prior to 60 days after a charge was filed with the state agency* as provided by 706(b) and (d). *Vigil* v. *American Telephone & Telegraph Co.*, 305 F.Supp. 44 (D. Colo. 1969).

We submit that the underlying principle of these decisions is that the procedural provisions of Title VII are

not to be viewed as like the requirements of common law pleading prior to the Reform Act, and that variances from the literal language of the Act cannot be allowed to prevent a hearing on the merits unless the irregularity so frustrates the purposes of the provision violated and so prejudices the defendant as to make it unjust to allow a hearing on the merits. Cf. *Henry* v. *Mississippi*, 379 U.S. 443 (1965) (application of state procedural rules must serve "legitimate state interest" if defendant is to be foreclosed from a hearing on his federal claim).

Viewed in the context of these cases, the appropriate inquiry here is whether the essential requirements of Section 706(b) and (d) were adequately met by petitioner and if not whether there was any prejudice to respondent to such degree as to foreclose plaintiff's claim that he has been denied equal opportunity for employment because of his race.

The intent of Congress in Section 706((b), as explained by Senator Humphrey, who, with Senator Dirksen, co-authored the section, was ". . . to guarantee that these States—and other states which may establish such programs—will be given every opportunity to employ their expertise and experience without premature interference by the federal government. . . ." (110 Cong. Rec. 12752). Senator Humphrey made it clear, however, that the right to federal relief under Title VII could not be defeated by the states where local solutions were not obtained stating, "At the same time, we recognized the *absolute* necessity of providing the Federal Government with authority to act in instances where States and localities did not choose to exercise these opportunities *to solve* the problems in a voluntary and localized manner." (Ibid.) (Emphasis added).

The legislative history of the time limitations contained in Section 706(d) is by no means as clear. We submit, however, that it is fair to conclude that the primary Congressional purpose in setting the various limitations was to assure that federal authorities were brought into a case while the matter was still fresh.

B. Petitioner Satisfied the Basic Purposes of Both Section 706(b) and Section 706(d).

With respect to Section 706(b), petitioner twice brought his complaint of racial discrimination before the Colorado Commission prior to the effective date of Title VII; twice the Colorado Commission failed to achieve a satisfactory resolution of the matter. Moreover, when petitioner applied to the EEOC for help, EEOC passed the complaint on to the Colorado Commission which specifically waived its jurisdiction. In these circumstances it can hardly be argued that the Colorado Commission was not given an opportunity to resolve the matter prior to the commencement of the federal investigation. Nor can it be argued that there was any prejudice to Respondent since it had earlier used the Colorado Commission to convey its unacceptable offer to petitioner.

Similarly, the purpose of Section 706(d) was accomplished by the procedures followed by petitioner. In view of the fact that continuously, during the entire period in which the administrative process was going on, petitioner was subjected to the identical policy of segregation which he believed to be unlawful, it is incontestible that the matter was fresh at the time that Petitioner brought it to the federal agency; the fact of the matter is that his initial complaint to the EEOC was concurrent with the conduct complained of. Certainly the Respondent who participated in the entire administrative process for two

years can hardly be said to have been legally prejudiced by the failure of Petitioner to file a second request for EEOC to proceed within 30 days of June 1, 1966. Indeed, Petitioner did file a sworn charge with EEOC on July 23, 1966. In view of the fact that the discriminatory practice which he complained was ongoing, and that Colorado had waived jurisdiction, certainly this sworn charge could be considered adequate compliance with Sections 706(b) and (d). Cf. *DeFigueiredo* v. *Trans World Airlines*, *supra*.

C. The Irregularities Found by the Court Below Are Inadequate As a Matter of Law and Policy to Be Jurisdictional Defects.

The court below never considered whether the procedures followed by petitioner met these basic purposes of the Act because it never even bothered to consider what those purposes are. Rather, the majority chose to read Section 706(b) and (d) as mechanically as possible to arrive at the conclusion that (as we distill it from the three opinions of the two-man majority) the following improprieties existed in the procedure followed by petitioner: (1) his initial filing in 1966 was with the EEOC rather than the Colorado Commission; (2) having filed with the EEOC, he allowed the EEOC to forward his complaint to the Colorado Commission rather than doing it himself; and (3) he did not restate his desire for EEOC to process his complaint after the Colorado Commission waived jurisdiction.

As a policy matter, it is unthinkable that such banal considerations as these could outweigh a national policy "of the highest priority". *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968). But even examining these alleged irregularities on their merits, it would be difficult to sustain them as jurisdictional defects. The first

two objections raised by the majority below amount to an invalidation of the EEOC's "deferral" procedures whereby complaints filed with the EEOC are referred to a state agency whenever the law so requires. This is perhaps the most disturbing aspect of the decision below, since about 18% of the charges handled by EEOC annually are deferred to state agencies in order to comply with Section 706(b).[2] The "deferral" procedure, which was embodied in a one paragraph EEOC regulation at the time petitioner filed his charge,[3] and is now set out in a much more detailed regulation,[4] is eminently sound and rea-

2. In Fiscal Year 1970, EEOC received 3,550 complaints in States with fair employment practice agencies from parties who had not contacted the State or local agency. The total number of complaints filed with the EEOC during that year 21,121. EEOC *Fifth Annual Report* pp. 82-83. This includes charges filed in southern and border states which do not have FEP laws.

3. See 30 Fed. Reg. 8408.

4. See 29 C.F.R. §1601.12 which now provides, in relevant part that:

> (a) In order to give full weight to the policy of section 706(b) of the Act which affords State and local fair employment practice agencies that fall within the provisions of that section an opportunity to resolve disputes involving alleged discrimination concurrently regulated by Title VII of the Civil Rights Act of 1964 and State or local law, the Equal Employment Opportunity Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission where there is no evidence that such allegations were earlier presented to the State or local agency. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The Commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to the State or local agency as is permitted by law and is practicable. It is the experience of the Commission that because of the complexities of the present procedures, persons who seek the aid of the Commission are often confused and even risk loss of protection of the Act. Accordingly, it is the intent of the Commission to simplify filing procedures for parties in deferral States and localities, and thereby avoid the accidental forfeiture of important Federal rights.
>
> (b) The following procedures shall be followed with respect to cases arising in the localities to which the Commission defers:

sonable. It obviates the red tape and possible confusion and disillusionment which might be engendered if the lay complainant were to be given the "run around" of having the EEOC return his complaint with instructions to file with some State or local agency. As the interpretation of a statute by the administrative agency charged with its implementation, the action taken by EEOC on Petitioner's complaint is entitled to great weight. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Udall* v. *Tallman*, 380 U.S. 1 (1965). It should not be rejected as the majority below did as a capricious "administrative 'flexible' filing". Moreover, the practice of deferring to a state agency in this manner had already been specifically ap-

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(1) Any document, whether or not verified, filed at any field office of the Equal Employment Opportunity Commission or at Washington, D.C., which may constitute a charge cognizable under Title VII, shall be deferred to the appropriate State or local agency pursuant to the procedures set forth below.

(i) All such documents shall be date and time stamped on receipt.

(ii) A copy of the original document shall be transmitted by registered mail, return receipt requested, to the appropriate State or local agency.

(iii) The aggrieved party shall be notified, in writing, that the document which he sent to the Commission has been forwarded to the State or local agency pursuant to the provisions of section 706(b), and that unless the Commission is notified to the contrary, on the termination of State or local proceedings, or after 60 days have passed, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case. Where the State or local agency terminates its proceedings within 60 days of the date of receipt of the document without notification to the Commission of such action, the date on which the aggrieved party is notified of the termination of the State or local action shall be deemed to be the date that the document was filed as a charge with the Commission.

(iv) The sixty-day period shall be deemed to have commenced on the receipt of the document by the State or local agency as evidenced by the date indicated on the return receipt. On notification of termination of State proceedings or the expiration of 60 days, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case.

proved by the Court of Appeals for the Third Circuit in *IBEW, Local 5 v. EEOC,* 398 F.2d 248 (C.A. 3, 1968), a decision which Judge Fahy pointed out in dissent was relied upon by the majority here, and in a case recently decided by the Eighth Circuit, *Marquez* v. *Sales Office Ford Motor Co.,* ..... F.2d ....., 3 FEP Cases 275, 276 (C.A. 8, 1971); see also *Fix* v. *Swinerton and Walberg Company,* ..... F.Supp. ....., 3 FEP Cases 9 (D. Colo. 1970).

In sum, the first two alleged defects found by the court below, (1) that Petitioner in 1966 sought the aid of the EEOC prior to filing a charge with the Colorado agency, and (2) allowing the EEOC to communicate his complaint to the Colorado Commission rather than doing so himself, are not inconsistent with the requirements of Section 706(b), even when that Section is given a rigid reading. Thus, the court below invented requirements for filing where the statute has none.

The remaining objection of the majority below was that petitioner did not reaffirm his desire for EEOC to process his complaint after the Colorado Commission waived jurisdiction. The conclusion that such a defect is a fatal infirmity seems to us absurd. Petitioner had twice been to the Colorado agency and received no relief. He had been seeking relief for more than nine years. The federal remedy had just become available, and he clearly indicated his desire to use it. To conclude that Petitioner lost interest in pursuing his federal remedies within the two weeks between his initial contact with EEOC and the waiver of jurisdiction over the case by Colorado requires going beyond the reasonable.[5]

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5. Current EEOC regulations adopt the more reasonable conclusion by informing those who file with the EEOC in state with fair employment laws that EEOC will begin processing the charge as soon as the law permits *unless* the charging party advises them not to do so. 29 C.F.R. §1601.12(b)(1)(iii). This regulation and the action of the EEOC prior to its formalization are entitled to great weight. *Griggs* v. *Duke Power Co., supra; Udall* v. *Tallman, supra.*

In the final analysis, this court's decision in *Crosslin* v. *Mountain States Tel. and Tel.*, 400 U.S. 1004 (1971) lays to rest the notion that Section 706(b) and (d) creates filing requirements which are jurisdictional in nature. In *Crosslin* this court indicated that its decision to remand to the district court was made in light of the arguments of the solicitor general that the failure of the charging party to resort to the state agency was due to advice from the EEOC. This disposition confirms the view that the defect here is not jurisdictional, for, as the Ninth Circuit in *Crosslin* had correctly noted, reliance on faulty advice cannot excuse a jurisdictional defect. Thus, by reversing the Ninth Circuit and suggesting that any defects in the administrative filing procedures could be cured by applying to the state agency *three years after* the alleged act of discrimination and after the EEOC had fully exhausted its process, this Court must have rejected the Ninth Circuit's view that Section 706(b) creates *jurisdictional* prerequisites to federal action.

II.

Since the Technical Filing Defects, If Any, Were Due to the Action or Inaction of the EEOC Petitioner May Not Be Penalized by Loss of His Right to Maintain an Action in the Federal Courts.

As we have shown, the statute permits persons seeking to assert federal rights under Title VII to invoke the aid of the EEOC in securing those rights prior to contacting any state or local agency. The EEOC has by regulation undertaken to protect complainants who apply to it for aid and to act in a manner consistent with the protection of their federal rights. The EEOC has at all times held itself and its procedures out as adequate to satisfy the requirements of Section 706(b) and (d).

In the instant case Petitioner sought the aid of the EEOC, and followed all advice and instructions given to him by that agency. The EEOC undertook by its regulation and by its actions the obligation of protecting Petitioner's federal cause of action. The EEOC undertook to make certain that Petitioner did not become ensnared in the intricacies of Section 706(b) and (d) and the Petitioner relied upon the EEOC to accomplish this purpose. As a lay person Petitioner could not be expected to do more. Accordingly, to the extent that there were any defects in perfecting the filing of either the state or the federal administrative charge, those defects are attributable to the EEOC. Accordingly, under this Court's decision in *Crosslin* v. *Mountain States Tel. & Tel., supra,* Petitioner is not to be penalized, as the court below has done, by loss of his federal right of action. Rather, he is to be given the opportunity to cure any alleged defects in his claim, and upon such cure to proceed in the federal courts.

CONCLUSION

The procedures followed by Petitioner with the aid of EEOC amounted to substantial compliance with the requirements of Section 706(b) and (d). These procedures have now been formalized in EEOC regulations whose purpose is to simplify the bewildering language of these sections so that the lay persons who seek governmental aid in redressing their grievances concerning racial discrimination, can go to EEOC without loss of their rights.

The decision of the majority below, on the other hand, does not have a single consideration of law or policy on its side. To the contrary, the decision below needlessly calls into question the validity of thousands of complaints now pending before EEOC.

In these circumstances, we submit that the decision below must be reversed. If this Court agrees that Petitioner adequately complied with the statute's procedural provisions it should reverse and remand to the district court so that the litigation may proceed. If, on the other hand, the Court finds any irregularities in the administrative process, it should remand the case to the district court with instructions that Petitioner be allowed to cure these defects and then proceed with the litigation.

Respectfully submitted,

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